UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THOMAS W. CHARRON, JR.,

Plaintiff,

v. 12 CV 6837 (WHP)

SALLYPORT GLOBAL HOLDINGS, INC., ET AL.,

Defendants.

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New York, N.Y.
April 19, 2013
12:00 p.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES

BAILEY & GLASSER, LLP
Attorneys for Plaintiff Charron
BY: JAMES B. PERRINE
ATHANASIOS BASDEKIS

HUSCH BLACKWELL, LLP
Attorneys for Defendant Sallyport
BY: BRIAN P. WAGNER

(Case called)

THE COURT: Good morning, counsel. Please be seated.

MR. PERRINE: J. B. Perrine and Athanasios Basdekis, your Honor, for the plaintiff.

THE COURT: Good morning, Mr. Perrine and Mr. Basdekis.

MR. WAAGNER: Good morning, your Honor.

Brian Waagner, for the defendants.

THE COURT: Good afternoon, Mr. Waagner.

This is oral argument on the defendant's motion to dismiss. Do you want to be heard, Mr. Waagner?

MR. WAAGNER: Yes, your Honor. Thank you. I will try to be brief because I know you've read the briefs which were extensive.

We view this case as an effort by the plaintiff who is bound to a contract under which he received a $40 million pay out for his interest in the company that he was a part owner of. This complaint is an effort to renegotiate the terms of that contract using contract law, tort law, every bit of law that the plaintiff could muster. And in our view none of the arguments that had been asserted by the plaintiff can avoid the dismissal of the case especially the tort counts.

I want to talk about the fraud count first. The only allegation as to any statement that's alleged to have been fraudulent appears in Paragraph 31 of the complaint under which

the plaintiff alleges that John DeBlasio advised the plaintiff that D.C. Capital Partners was no longer interested in doing an acquisition of Sallyport Global.

In our view even, if that was true, assuming as we must for purposes of the motion to dismiss, there is no basis for a fraud claim first because it's duplicative of the contract. That representation happened shortly before the plaintiff and Mr. DeBlasio and Sallyport Global Holdings negotiated a contract to purchase Mr. Charron's interest in the company. Under that contract he received a $40 million payout for his interest in the company. And he also received that windfall protection promise which provides for an additional payment to Mr. Charron, precisely, in the event that windfall a purchase occurs. And it was precisely the potential for a deal with D.C. Capital Partners or another one of the companies that had been looking at making an acquisition to Sallyport Global Holdings that was the reason for that windfall protection provision.

Mr. Charron was, certainly, well informed about the possibility that there was going to be a subsequent deal. He was the CEO of the company. He was the part owner of the company. He was, certainly, sophisticated enough to understand the parameters of that arrangement. He engaged Williams & Connelly to represent him in the negotiation of that contract. So in our view, that fraud count goes away because it's

duplicative for -- exactly duplicative of the contract claim.

Moreover, there's no reliance on the part of Mr. Charron and, certainly, no reasonable reliance. He engaged counsel and negotiated contract provisions to protect himself, etc. The claim, if there is one, falls under the contract.

THE COURT: If the defendants knowingly obscured the real enterprise value of Sallyport, couldn't that constitute a fraud as well as a breach of contract?

MR. WAAGNER: There's two aspects of that. The allegation in the complaint is that there was an attempt to obscure the enterprise value after the fact. And that, certainly, couldn't be an allegation, couldn't support an allegation of fraud because there is a contract remedy. If there was an attempt to obscure an after the fact it, certainly, would be the element of reliance that would have led Mr. Charron to take some action to his detriment. It, certainly, didn't do that. And if there was some kind of obfuscation or something that was improper under the contract then the contract would protect Mr. Charron's interests.

THE COURT: What about the cash transfers?

MR. WAAGNER: The cash transfers were legitimate activities of the 100 percent shareholder owner of the company that happened prior to the transfer. And in our view the cash transfers are not a basis for a claim precisely because the contract doesn't address that. The contract says if there is a

sale at a price reflecting an enterprise value of $65 million then there would be an additional payment due as a windfall payment.

The cash transfers that happened prior to that were, one, there was, certainly, nothing improper about those. All the transactions that had been under consideration prior to the D.C. Capital Partners transaction had been on the basis of a cash free deal. No company was going to acquire a company and pay one dollar to get a dollar of cash.

THE COURT: Why is the term "enterprise value" ambiguous as applied to the Kaseman transaction, K-a-s-e-m-a-n, the Kaseman transaction?

MR. WAAGNER: It's not ambiguous because the contract says "price". It's not -- it doesn't allow for a third party evaluation of enterprise value. The contract says if a transaction occurs at a price reflecting an enterprise value then there's a windfall. And the price here was for 100 percent of the stock, $64.5 million. There really isn't any ambiguity that needs to be resolved. There is no doubt that the price was $64.5 million. There's, certainly, nothing in the complaint, the reference to McGladry audit, for example. That's a generally accepted accounting principle, sort of analysis that's done for the acquiring company with respect to how it records assets that it's acquired on its books for depreciation purposes and other things. It's not a

retrospected look at what the real value of the transaction was. In fact, the McGladry report was the real value of the transaction was something less than $64.5 million with holdbacks and what not.

I want to talk just about the good faith and fair dealing elements. The only argument that the plaintiff has asserted with respect to good faith and fair dealing and there's two counts to that is that it was his understanding that the owners of Sallyport wouldn't take any action after he sold out his interest in the company that would be to his detriment. Well, there, certainly, isn't anything in the contract that would have supported that. And if the Court were to accept that as an argument, there would be one inconsistent with the contract which the cases clearly don't allow. And we point out the Metropolitan Life Insurance case and a couple other cases in our brief that are, specifically, on point with respect to that. That would be, essentially, an argument that the plaintiff after having sold out his interest in the company can have some say in what activities the company took after he sold his interest.

Now, if John DeBlasio had decided to liquidate the company or just to stop doing any activities altogether and drive the company into the ground there, certainly, wouldn't be any remedy at all. There wouldn't be a tort remedy, etc., and that's, essentially, what we're arguing about in our view.

THE COURT: I think I understand your arguments. Let me hear from your adversary.

Mr. Perrine?

MR. PERRINE: Yes, your Honor.

Your Honor, one thing is I believe as we pled in our first amended complaint that we are willing to simplify this case, preserve judicial economy, reduce litigation costs, all the things in our interests and the Court's interests if the defendants are willing to admit that they're bound to the agreement, to the contract, the December 2010. If the company, John DeBlasio and World Peace Trust through its trustees are willing to admit that they're bound to that agreement, then we've pled all of these tort claims in the alternative. And if they're willing to admit they're bound to the agreement through the duration of this litigation and won't raise that as a defense now until we get to the jury or get before the Court, then we're willing to dismiss the fraud and the tortuous interference and the conspiracy and unjust enrichment claim. We've pled them all in the alternative in the instance that the Court would find that one of the defendants was not bound to the contract.

THE COURT: Well, let's focus on the contract aspects of this case. At the time of the two alleged, the first two alleged windfall sales, weren't the World Peace Trust and the Sallyport affiliates of Mr. DeBlasio?

MR. PERRINE: No, your Honor. We would say that they're not affiliates. One, with respect to the agreement and in one of that is -- cause the contract says if John DeBlasio or his affiliates or direct or indirect equity holder sells 20 percent or more of the company, then the windfall sale occurred. "Affiliates" isn't defined in the agreement. So, one is it's an undefined term in the agreement. What does that mean? But more so, if you just look at the three things you just named, your Honor, you have an individual, John DeBlasio, who is a citizen of Illinois. You have Sallyport Global Holdings which is a Delaware C corporation. Then you have the World Peace Trust which is a Bermuda irrevocable charitable trust which John DeBlasio does not control. He cannot operate that quarriable trust willy-nilly any way he wants. They all file separate tax returns. There's been no argument on either side of this case that the Court should pierce the corporate veil of any of these entities. They all file separate tax returns. The fact that on each one --

THE COURT: Isn't it his trust?

MR. WAAGNER: No, it's not his trust, your Honor. It's not like a grand tort trust done for estate planning purposes like the plaintiffs grand tort trust. It is a Bermuda entity that is governed by Bermuda law and it is not his.

THE COURT: It's named for him.

MR. PERRINE: It is named for him, that's correct,

your Honor, but --

THE COURT: It's his money.

MR. PERRINE: I would say he can't treat the money in the trust any way that he wants to. He can't take the money of the trust and buy himself a Maserati. He cannot do that. If it's in his bank account, John DeBlasio's personal bank account, he could. But if it's in the bank account of the World Peace Trust he cannot take the money out and buy himself a yacht and go sail around the French Riviera. It is not his money. It is the trust money. And he is the mere protector of the trust. He is not the trustee and he is not the beneficiary.

THE COURT: But aren't they affiliated? I mean, isn't the agreement clear that an affiliate is not a third party and that a windfall sale has to be to a third party?

MR. PERRINE: I would admit, your Honor, that third party, little "t", little "p" is what's reared to trigger a windfall sale. I would say with all due respect, your Honor, that at this point in time, a motion to dismiss stage that is an ambiguous term in the contract. It is not ripe for dismissal. It could be after the discovery is taken and depositions are had and expert testimony weighs in that it could be that they are what was in ten of the parties in writing the agreement that the World Peace Trust is not a third party. But at this stage at best, your Honor, that is an

ambiguous term in the contract. That is not right for dismissal.

THE COURT: Doesn't the trust further DeBlasio's charitable goals, whatever they may be?

MR. PERRINE: Your Honor, the trust furthers the charitable objects that the trust itself through its trustees and directors appoint. And John DeBlasio as I said, your Honor, is not the trustee. He is the protector. He is not the one who decides how the trust money should be spent and there's restrictions in the trust document on what the purposes can be used for. John DeBlasio and the World Peace Trust are just simply not the same, your Honor.

THE COURT: I understand they're not the same. The question is whether they're third parties or affiliates.

MR. PERRINE: And I would say, your Honor, at this point in the litigation that is ambiguous at best and it cannot be decided now on the present record. Nobody is arguing to disregard the corporate form. If they were going to disregard the corporate form then why for the first windfall sale did they have all the formal agreements in place? We had a promissory note that was given by the Delaware Corp, Sallyport Global Holdings, to Sallyport Global Services Limited, a Bermuda entity. And then the SGS, the Bermuda entity, gifted that through a formal assignment to the World Piece Trust. And then again, you had formal documents of the capital

contribution of that same promissory note back to the company and then you had a formal transfer of stock ownership to the World Peace Trust.

THE COURT: Couldn't a distinct entity still be an affiliate without piercing any veil?

MR. PERRINE: I think, your Honor, that it all depend on what the intent of the parties was with respect to this agreement and at this point in time that we have not proceeded far enough in discovery to determine what the intent of the parties was with respect to this particular transaction. Could it be? It may be, your Honor, but we don't know yet because we have not explored the intent of the parties on what was meant by this provision and it is not defined in the agreement.

THE COURT: How could SGS or JPD trust be liable for breach of contract?

MR. PERRINE: Well, one, your Honor, if they admit they're bound to the agreement they're acting. So, one, they can assume the agreement which we have stated in our papers that the JPD Trust as trustees for World Peace Trust has assumed contractual liability and that in the agreement it states that the company or the selling stockholder in this -- and for the -- I guess, the Court is referring to the third windfall sale because that would be the sale which the trust was the selling stockholder, that the trust was the selling stockholder can only be held liable to the contract through its

representative, the trustee, which is SGS, the former trustee, and not JPD trust, the current trustee. And so even though they may have not been signatories to the agreement that the agreement, specifically, makes reference to them as selling stockholders, they knew about the agreement because John DeBlasio was the president of SGS, was the protector of the trust. He did sign and negotiate the agreement with Tom Charron, so that SGS was aware and JPD was aware of the agreement and that they both benefited from the agreement and that the shares obtained from Tom Charron were transferred to the World Peace Trust. And World Peace Trust sold those shares and in exchange has received roughly $89 million.

And I would say, your Honor, the current trustee of the trust is not arguing that the trust is not bound to the agreement. In fact, they're saying just the opposite in their papers that they are bound to the agreement.

THE COURT: All right. Anything further?

MR. PERRINE: No, your Honor.

THE COURT: Anything further, Mr. Waagner?

MR. WAAGNER: Just on the affiliate question. You can look at the exhibits to the first amended complaint and it identifies John DeBlasio as the signatory on both sides of those transactions which are affiliated company transactions. There is no ambiguity about whether they are affiliates or not. The documents attached to the amended complaint clearly address

that.

THE COURT: This Court has reviewed all of the parties' extensive motion papers and I've considered your arguments and I am prepared to rule on motion.

The plaintiff Thomas W. Charron, Jr. asserts breach p contract and tort claims against defendants, Sallyport Global Holdings Inc., Sallyport Global Services Limited, JPD Private Trust Company Limited and John P. DeBlasio. All defendants move pursuant to Rule 12(b)(6) to dismiss Charron's amended complaint for failure to state a claim. SGS, that's Sallyport Global Services, also moves to dismiss on personal jurisdiction grounds under Rule 12(b)(2).

Demonstrating personal jurisdiction is Charron's burden. See Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994). To meet his burden, Charron must make a prima facie showing which requires an averment facts that, if credited, would you suffice to establish jurisdiction over the defendant. Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 163 (2d Cir. 2010). The Court construes the parties' submissions in the light most favorable to Charron resolving all doubts in his favor. Southern New England Telephone Co. v. Global NAPs Inc., 624 F.3d 123, 138 (2d Cir. 2010).

The Stock Purchase Agreement contains a New York form selection clause. But SGS, a Bermuda entity, did not sign the agreement. And the shareholders of a Delaware corporation like

Sallyport Global Holdings Inc. are not bound by the corporation's contracts. See NetJets Aviation Inc., v. LHC Communications LLC 537 F.3d 168, 176 (2d Cir. 2008). Because there's indication that SGS IS claiming benefits under the Stock Purchase Agreement, SGS is not bound by the Agreement's form selection clause. CF American Steamship Owners Mutual Protection & Indemnity Association Inc. v. American Boat Co., No. 11 CV 6804 (PAE), 2012 WL 527209 at *4 (S.D.N.Y. February 17, 2012).

SGS's alleged contacts with New York are not nearly continuous and systematic enough to subject it to general jurisdiction here. See In re: Terrorist Attacks on September 11, 2001, F.3d 2013 WL 1590255 at *10 (2d Cir. 2013). And SGS is not subject to long-arm jurisdiction and CPLR Section 302(a)(1) because it's alleged contacts with New York have nothing to do with this lawsuit. Accordingly Charron's claims against SGS are dismissed for lack of personal jurisdiction. Jurisdictional discovery is unwarranted because Charron provides no information suggesting that such discovery would uncover any facts showing personal jurisdiction over SGS.

Turning tot he 12(b)(6) motions, this Court accepts the factual allegations in the complaint as true and construes all reasonable inferences in plaintiff's favor. McGarry v. Pallito 687 F.3d 505, 510 (2d Cir. 2012). To survive a motion to dismiss "a complaint must contain sufficient factual matter

accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Regarding the breach of contract claims, Charron's allegations show that the first two alleged windfall sales were merely transfers among DeBlasio and his affiliates, not sales to "third parties". Because a windfall sale must be a sale to a third party these two transactions cannot form the basis of a breach of contract claim. Charron's breach of contract with respect to the first two alleged windfall sales are therefore dismissed as are his faith and fair dealing claims in connection with these transactions.

On the other hand, Charron states a plausible breach of contract claim regarding the Kaseman transaction. Whether the Kaseman transaction reflected an enterprise value of Sallyport greater than 65 million turns on disputed factual issues including the purpose of Sallyport's cash transfers. "If a contract is ambiguous as applied to a particular set of facts, a Court has insufficient data to dismiss a complaint for failure to state a claim." Eternity Global Master Fund Limited v. Morgan Guar. Trust Co., 375 F.3d 168, 178 (2d Cir. 2004). At a minimum the Agreement's use of the term "enterprise value" is ambiguous as applied to the Kaseman Transaction, at least accepting Charron's allegations as true. And this ambiguity precludes resolving this claim at the pleading stage. Similarly, whether defendants breached their implied covenant

of good faith and fair dealing in connection with the Kaseman Transaction presents a factual question that cannot be resolved on the pleadings. See Anderson News, L.L.C. v. Am. Media Inc. 670 F.3d 162, 185 (2d Cir. 2012).

Because damages are a "largely factual issue," Ainger v. Michigan General Corp., 632 F.2d 1025, 1027 (2d Cir. 1980), they are not properly considered as a basis for dismissal of Charron's contract claim at the pleading stage. See Anderson News 680 F.3d at 185. Further, the plain language of Section 2.04 of the Stock Purchase Agreement shows that Sally may be liable to Charron in the event of a windfall sale even if it did not receive the proceeds from such a sale. Accordingly, defendants' motions to dismiss Charron's breach of contract claim in connection with the Kaseman transaction are denied.

In addition to his breach of contract claims, Charron brings an assortment tort claims asserting that defendants conspired to deny him compensation for windfall sales. But this smorgasbord of claims reflect an unwarranted and all too common attempt to transmogrify a straightforward contract dispute into a wide-ranging tort case.

First, Charron's claims for tortious interference with contractual relations fail. The JPD Trust didn't exist at the time of the first two purported breaches, so it cannot plausibly have caused them. And JPD Trust was formed under the Kaseman Stock Purchase Agreement, so it did not plausibly cause

the Kaseman Transaction. Further, even assuming that this Court had jurisdiction over SGS, Charron alleges that SGS was a mere conduit that DeBlasio used to facilitate his breaches. SGS was not, therefore, the "but for" cause of any breach. See Granite Partners LP v. Bear, Stearns & Co., 17 F.Supp. 2d 275, 293 (S.D.N.Y. 1998).

Charron's claims for fraud and constructive fraud are similarly unavailing. Charron's fraud claim boils down to the allegation that defendants intended to breach the windfall sale provision from the outset. But this theory is not cognizable. "It is well settled under New York law that party cannot maintain a claim fraud predicated on a breach of contract merely by alleging that the breaching party never intended to perform." C3 Media & Marketing Group LLC v. FirstGate Internet Inc., 419 F.Supp 2d 419, 430, (S.D.N.Y. 2005). A fine opinion, if I say so myself. Further, DeBlasio's alleged statements are not actionable because they're unrelated to uncertain future events. See Eternity Global Master Fund 375 F.3d at 187-88. Accordingly, Charron's fraud and constructive fraud claims are dismissed.

Next, Charron's civil conspiracy claim fails because this is an ordinary breach of contract case, not a tort case. Because Charron fails to state a claim regarding any underlying tort, his civil conspiracy claim is dismissed. See World Wrestling Federation Entertainment, Inc. v. Bozell, 142 F.

Supp. 2d 514, 532-33 (S.D.N.Y. 2001).

Finally, Charron's unjust enrichment claims fail because a written contract, the Stock Purchase Agreement, governs whether Charron is entitled to compensation for the purported windfall sales. The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Deisel Props S.r.L. v. Greystone Business Credit II LLC, 631 F.3d 42, 54, (2d Cir. 2011). Accordingly, Charron's unjust enrichment claims are dismissed.

For the foregoing reasons defendant's motions to dismiss are granted in part and denied in part. All claims against SGS are dismissed for lack of personal jurisdiction. Charron's breach of contact claims against the first two alleged windfall fall sales are dismissed as are his tort claims. But defendant's motion to dismiss Charron's breach of contract claims regarding the Kaseman transaction are denied. This constitutes the ruling of this Court. I'll enter a short order on the docket reflecting the ruling.

Now, do we have a discovery schedule in place in this case?

MR. PERRINE: We do, your Honor.

THE COURT: All right. So you'll proceed with discovery. If you can't settle the case -- but this is a

breach of contract case, so the concession that you were seeking at the start of your argument, Mr. Perrine, has largely been dealt with by the Court and this case should go forward promptly and, ultimately, we'll try it if you don't settle it.

All right. Anything further?

MR. PERRINE: No, your Honor.

MR. WAAGNER: No, your Honor.

THE COURT: Thank you. Have a good afternoon.

(Adjourned)